

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
NEWPORT, SC** **SUPERIOR COURT**

SEA FARE'S AMERICAN CAFE, INC.	:	
GEORGE KAROUSOS AND ANNA	:	
KAROUSOS	:	
Plaintiffs	:	
	:	
V.	:	C.A. NC94-0077
	:	
BRICK MARKET PLACE ASSOCIATES	:	
AND FEDERAL MANAGEMENT CO., INC.	:	
Defendants	:	

DECISION

THUNBERG, J. This matter was heard by the court in a jury-waived trial on December 2-3, 1999.

This dispute centers on the interpretation of various agreements entered into by the parties in 1992.

Since 1992, Sea Fare's American Cafe (Sea Fare) and Brick Market Place Associates (BPMA) have enjoyed a landlord/tenant relationship. At the commencement of their relationship, the parties entered into a series of agreements which now form the basis of this suit. The first agreement at issue is a ten year lease whereby Sea Fare became the largest tenant in the Brick Market Place. The second allowed the plaintiff to buy, for \$100,000, the restaurant equipment which defendant repossessed from the previous occupant. In addition to these disagreements, Sea Fare claims that in the first two years of its operation it was excessively charged for its water use. Unable to settle their disputes, the plaintiff brought suit for declaratory judgment and damages. In December 1999, the parties brought cross-motions for summary judgment. After hearing arguments and reviewing the entire record, the Court ordered:

“Plaintiffs’ motion for partial summary judgment is granted.

The public parking area located at the southerly end of Brick Market place constitutes an increase in the rentable space in the Property, and, therefore, plaintiffs’ percentage share of the lessor’s expenses in operating the Property shall be adjusted accordingly.

The defendant is responsible for reimbursing the plaintiffs for the costs expended to replace certain items of inventory in an amount to be determined by the Court.

The defendants’ motion for partial summary judgment is denied.”

After the issuance of the aforementioned decision, three issues¹ remain to be settled: 1) the amount of Sea Fare’s adjusted percentage share as of the second year of the lease; 2) the fair and reasonable cost of replacement of the missing restaurant equipment and 3) the extent to which, if any, Sea Fare was overcharged for water usage before the installation of its own water meter.

Adjusted Percentage Share

As acknowledged in the earlier decision, the ten year lease under which the parties are operating requires Sea Fare to pay a base rent of \$4,000 per month, an additional rent based upon a percentage of gross sales and a percentage share of real estate taxes and operating expenses on the property. (Lease, pp. 2-8). It is the percentage share of real estate taxes and operating expenses that is currently at issue. This Court heard testimony from Mr. Jack Booth, the proprietor of the parking lot in the Brick Market Place. Booth stated that he pays 75% of his proceeds from the parking lot to BPMA as rent but he does not contribute to any of the operating expenses. These operating expenses, to which the plaintiffs do contribute, include: “maintenance of the parking lot, snow removal from the

¹ In their Post-trial Memorandum, Defendants argue for a reversal of this Court’s earlier decision on the motions for summary judgment. This Court stands by its previous decision and will therefore address only the items that remain undecided.

parking lot, drainage for the parking lot, and provision of adequate lighting for the parking lot.” (Lease, paragraph 4).

The court also heard testimony of Mr. David Bray, a registered land surveyor who established that the size of the rented parking lot is 20,385 square feet.² The building itself comprises 19,611 square feet creating a total square footage of 39,996. Sea Fare occupies 6,600 square feet. In accordance with not only this Court’s earlier decision, but also the terms of the lease, Sea Fare’s percentage share should be reduced from 33.96% (based on the 19,611 square footage) to 16.50% (based on 39,996 square feet).

This Court adopts Sea Fare’s calculations as presented by their accountant Edward Helger as his calculations were not challenged at trial. According to Mr. Helger’s testimony, Sea Fare should have paid \$123,030.65 in additional rent and they in fact paid \$181,997.24. The result is an overpayment of \$58,996.59. Finding Mr. Helger to be competent and his calculations accurate, this Court orders that BMPA reimburse Sea Fare \$58,996.59 in accordance with this decision.

Missing Inventory

On February 15, 1992, BPMA and Sea Fare entered into an agreement for the purchase and sale of certain business assets which had been owned by the previous tenant. The agreement lists the following assets:

- (a) the keys;
- (b) the liquor license
- (c) furniture, fixtures and equipment including trade fixtures;

² The defendants did not present any rebuttal witnesses.

(d) plates, dishes, silverware, kitchen utensils and kitchen equipment;

(e) virtualing license

The record contains a preliminary but extensive inventory list dated January 13, 1992. In response to interrogatories propounded by defendants, Mr. George Karousos stated,

“A general inventory of what was on the premises was conducted which satisfied us that we virtually would have a ‘turn-key’ operation. After we moved in we discovered that essential items were missing, including glassware, dishes, silverware, equipment and pots and pans. It was evident that items essential to the operation of a restaurant had been removed. We informed Mr. McSweeney, who told us that the prior tenant had the right to remove only its personal items. We never counted exactly how many glasses, dishes, etc. were on the premises before we moved in because we were assured money would be held in escrow to cover any such eventuality. Sea Fare’s spent \$10,000 to replace basic items to operate a restaurant.”

Plaintiffs own and operate a gourmet restaurant in Portsmouth called the Sea Fare Inn. The court is of the belief that they are fully aware of the basic necessities required to ensure the smooth operation of such an establishment. Accordingly, this Court is convinced that the absence of such basics as plates, silverware and glassware would be conspicuous to someone intending to purchase a “turn key” operation. The record indicates that the plaintiffs took note of these items during their preliminary inventory, noting that there were sufficient amounts of each to at least open the restaurant without problems. Plaintiffs were told that money would be held in escrow to be used in the event that inventory was missing after the sale was consummated. Plaintiffs relied on that representation and purchased replacements for the missing inventory. The plaintiffs submitted an itemized list of the purchases made and this evidence was uncontroverted. This Court now finds that the \$9,511.33 they spent represents the fair and reasonable value of the cost to replace missing china, flatware, glassware and kitchenware. Accordingly, the defendants are ordered to reimburse plaintiffs that amount.

Charges for Water Usage

Plaintiff claims that it is entitled to reimbursement for an overcharge for water usage in 1992 and 1993. Under the terms of the lease, “Lessor shall furnish water and sewage service to the demised premises, subject to the provisions in this lease requiring the Lessee to reimburse the Lessor for the Lessee’s allocated share of the cost of such water and sewage service.” Lease at 13. The lease also provides that “the Lessee shall have the right at its own expense to install meters for determining the actual amount of its sewer and water usage.” Id. at 7.

For the first two years of operation, Sea Fare’s water and sewage usage was determined by reading the common meter shared by all Brick Market tenants. Daniel McSweeney, the property manager for Brick Market, testified that both he and City of Newport read the water meters. Prior to the installation of its own water meter, the City of Newport Water Department personnel read the water meter, presented the bill to Brick Market Place and BMPA allocated eighty-eight (88%) of the amounts actually used in the entire project to Sea Fare. Defendants’ Proposed Findings of Fact and Rulings of Law, 10. Defendants state that the 88% reflected the practice in place with the predecessor restaurant. Id.

It is undisputed that Sea Fare was charged \$14,385 in 1993 and \$9,919 in 1994. After the installation of its own water meter, the water bills dramatically decreased.

1994	\$6,230.61
1995	\$6220.50
1996	\$8,243.77
1997	\$8,546.11
1998	\$9,589.31
1999	\$7,040.45

Mr. Karousos testified that based on his own personal observation, the start up years of the restaurant require substantially less water and sewage use than the following years. Given the great disparity in the monetary amounts the first two years as compared with 1994-1999, this Court is convinced that Sea Fare was overcharged to some extent. The credible evidence compels the conclusion that water usage in the “start-up” years could not possibly have exceeded that of succeeding years when the restaurant was an established business. The precise amount of gallonage for the early years is not susceptible to calculation. Although the court is of the belief that the amount utilized was less than the lowest amount for the recorded years, the court can state with certainty that it was below the highest metered amount. Therefore, the Court will use the figure from 1998 which represents the highest water consumption recorded by the separate water meter. The defendant is hereby ordered to reimburse the plaintiff for the difference between the amount paid in 1998 and that which was charged in 1993-1994.